89-1295
No. _____

In The

# Supreme Court of the United States

October Term, 1989

STATE OF CONNECTICUT,

*Petitioner,*

v.

JOHN LONERGAN,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

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## QUESTION PRESENTED

DOES THE FIFTH AMENDMENT DOUBLE JEOPARDY CLAUSE BAR A PROSECUTION FOR DRIVING UNDER THE INFLUENCE AFTER ACQUITTAL ON A MANSLAUGHTER CHARGE ARISING OUT OF THE SAME INCIDENT, WHEN THE TWO OFFENSES ARE NOT THE SAME UNDER *BLOCKBURGER V. UNITED STATES*, 284 U.S. 299 (1932), BUT THE STATE INTENDS TO RELY ON THE SAME EVIDENCE IN THE LATTER PROSECUTION AS IT USED IN THE FORMER?

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## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

The State of Connecticut respectfully petitions that a writ of certiorari issue to review the judgment and opinion of the Connecticut Supreme Court, entered in this proceeding on November 28, 1989.

## OPINION BELOW

The opinion of the Connecticut Supreme Court is reported at 213 Conn. 74, 566 A.2d 677 (1989) and is reprinted in the appendix, p. A1, *infra*. The decision of the Connecticut Appellate Court is reported at 16 Conn. App.

358, 548 A.2d 718 (1988) and is reprinted in the appendix, p. A28, *infra*.

## JURISDICTION

The decision of the Connecticut Supreme Court was entered on November 28, 1989. The order denying the timely motion for reargument and/or reconsideration was entered on December 14, 1989. A copy of this order appears in the appendix, p. A54, *infra*. The jurisdiction of this Court to review the judgment of the Connecticut Supreme Court is invoked under 28 U.S.C. § 1257.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Connecticut General Statutes § 14-227a (Rev. to 1985) provided in pertinent part:

> OPERATION WHILE UNDER THE INFLUENCE OF LIQUOR OR DRUG OR WHILE IMPAIRED BY LIQUOR. (a) OPERATION WHILE UNDER THE INFLUENCE. No person shall operate a motor vehicle on a public highway of this state or on any road of a district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any private road on which a speed limit has been established in accordance with the provisions of section 14-218a, or in any parking area for ten or more cars or on any school property while under the influence of intoxicating liquor or any drug or both.

Connecticut General Statutes § 53a-56b (Rev. to 1985) provided in pertinent part:

> (a) A person is guilty of manslaughter in the second degree with a motor vehicle while intoxicated when, in consequence of his intoxication while operating a motor vehicle, he causes the death of another person. For the purposes of this section, 'intoxication' shall include intoxication by alcohol or by drug or both.

(b) Manslaughter in the second degree with a motor vehicle while intoxicated is a class C felony and the court shall suspend the motor vehicle operator's license or nonresident operating privilege of any person found guilty under this section for one year.

## STATEMENT OF THE CASE

The respondent's automobile collided with a motorcycle on May 22, 1985, in Hartford, Connecticut. The respondent was thereafter charged with operating a motor vehicle while under the influence of liquor, in violation of Connecticut General Statutes § 14-227a. *See infra*, at p.3. Following the death of the motorcyclist, the respondent was charged with the additional offense of manslaughter in the second degree with a motor vehicle while intoxicated, in violation of Connecticut General Statutes § 53a-56b. *See infra*, at p. 3. The respondent pleaded not guilty to both charges.

The state elected to sever the two charges and proceeded to trial solely on the manslaughter charge. The respondent was tried to the court and acquitted on the manslaughter charge because the state had failed to prove beyond a reasonable doubt that the respondent's alleged intoxication had caused the death. Thereafter, the state prosecuted the respondent on the remaining charge of operating a motor vehicle while under the influence. The respondent moved to dismiss under the Double Jeopardy Clause of the Fifth Amendment and the trial court granted the motion.

The state appealed the trial court's ruling to the Connecticut Appellate Court, which affirmed the dismissal. The Connecticut Supreme Court subsequently granted the state's petition for certification and affirmed, with one justice dissenting. The court held that the two offenses in question were not the same under the traditional double jeopardy analysis established by this Court in *Blockburger v. United States*, 284 U.S. 299 (1932), because each offense requires proof of an element that the other does not. *State v. Lonergan*, 213 Conn. at 78-81; Appendix, at A5-A8. The court went on to hold, however, that "if the same evidence offered to prove a violation of the offense charged in the first prosecution is the sole evidence offered to prove an element of the offense charged in the second prosecution, then prosecution of the second offense is barred on double jeopardy grounds, regardless of whether either offense requires proof of a fact that the other does not." *Id.* at A21-A22.

## REASONS FOR GRANTING THE PETITION

### THE JUDGMENT OF THE CONNECTICUT SUPREME COURT, WHICH HOLDS THAT A REPETITION OF EVIDENCE PRECLUDES SUCCESSIVE PROSECUTIONS UNDER THE DOUBLE JEOPARDY CLAUSE, CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF THIS COURT AND RAISES AN IMPORTANT, RECURRING, AND UNRESOLVED QUESTION WORTHY OF CERTIORARI REVIEW

This case presents a substantial issue regarding the scope of double jeopardy protection in multiple prosecutions. The decision of the Connecticut Supreme Court hinges on an examination of the actual evidence to be

offered by the state at trial, without regard to the dissimilarities between offenses, and holds that a repetition of evidence in successive prosecutions violates the Double Jeopardy Clause of the Fifth Amendment. This result refutes this Court's consistent advocacy of a double jeopardy analysis based solely on an examination of the statutory elements of the crimes involved, without reference to the evidence offered at trial. The mere duplication of evidence in successive prosecutions does not offend the Double Jeopardy Clause. *Brown v. Ohio*, 432 U.S. 161 (1977); *Illinois v. Vitale*, 447 U.S. 410 (1980).

Connecticut is by no means alone in pointing up the conflict posed by decisions such as this one. There is widespread disagreement among state and federal courts regarding the appropriate analysis applicable to double jeopardy claims in successive prosecution cases, a variance which has far-reaching implications for our system of criminal justice. In the absence of clear guidance from this Court, lower courts have applied inconsistent standards, predictably resulting in confusion and uncertainty in such cases. If decisions like this one are allowed to stand, prosecutors will be forced to join all charges against criminal defendants, lest they risk dismissal of a successive prosecution. Conversely, criminal defendants may be afforded the unconscionable windfall of avoiding criminal liability when, under federal law, a successive prosecution poses no violation of the Double Jeopardy Clause.

### A. The Opinion Of The Connecticut Supreme Court Conflicts With The Double Jeopardy Decisions Of This Court Which Apply The *Blockburger* Test

In addressing double jeopardy claims in the successive prosecution context, this Court has consistently

relied on the *Blockburger* test. *Brown v. Ohio, supra; Illinois v. Vitale, supra; See Borchardt v. United States*, 469 U.S 937, 105 S.Ct. 341, 344 n.3 (1984) (Brennan, J., dissenting from denial of certiorari) (majority of court continues to apply *Blockburger*, tempered only by application of collateral estoppel doctrine). The *Blockburger* test provides:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not . . .

*Blockburger v. United States*, 284 U.S. at 304.

This analysis focuses on the statutory elements of the two crimes, rather than on the actual evidence to be presented at trial. *Illinois v. Vitale*, 447 U.S. at 416. If each statute requires proof of a fact that the other does not, "the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes . . ." *Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975). "The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the [less serious offense] to establish an element of [the more serious offense] would not be sufficient to bar the latter prosecution." *State v. Lonergan*, 213 Conn. at 94 (Callahan, J., dissenting), quoting *Illinois v. Vitale*, 447 U.S. at 419; Appendix at A24.

Here there is no dispute that the offenses of manslaughter with a motor vehicle while intoxicated and operating under the influence are not the same under the

*Blockburger* test, as each offense requires proof of a fact that the other does not. *See State v. Lonergan*, 213 Conn. at 80-81; Appendix at A7-A8. The two offenses do not stand in the relationship of greater and lesser included offense, since it is possible to commit the manslaughter offense without having first committed the operating under the influence offense. In Connecticut, the prosecutor who has established manslaughter with a motor vehicle has not necessarily established operating under the influence as well. A second prosecution is thus permissible under these circumstances. *Cf. Brown v. Ohio*, 432 U.S. at 164-168 (Double Jeopardy Clause is violated because prosecutor who has established greater offense of auto theft has necessarily established lesser offense of joyriding as well); *Harris v. Oklahoma*, 433 U.S. 682 (1977) (where conviction of greater crime, murder, cannot be had without conviction of lesser crime, robbery with firearms, double jeopardy bars prosecution for lesser crime after conviction of greater one).

Yet, despite the dissimilarities between the offenses of manslaughter and operating under the influence in this case, the Connecticut Supreme Court held that the two offenses are the "same" for double jeopardy purposes solely because the "same" evidence supported the two prosecutions. *State v. Lonergan*, 213 Conn. at 92; Appendix at A21-A22. The double jeopardy protection afforded to criminal defendants in Connecticut has thus become much broader than the decisions of this Court allow. As former Chief Justice Burger stated in *Illinois v. Zegart*: "Our cases, particularly *Vitale* and *Brown*, require the courts to look to the statutory elements of the first and second charges, not to the similarities of facts in the

government's proof." *Illinois v. Zegart*, 452 U.S. 948, 951 (1981) (Burger, C.J., dissenting from denial of certiorari).

As a corollary matter, the Double Jeopardy Clause imposes no requirement that the state "join at one trial all the charges against a defendant that grew out of a single criminal act, occurrence, episode, or transaction." *Ashe v. Swenson*, 397 U.S. 436, 453-54 (1970) (Brennan, J., concurring). The fact-specific test adopted by the Connecticut Supreme Court effectively eviscerates this prosecutorial discretion of the state. Because successive prosecutions will, in the normal course of events, derive from the same criminal occurrence, such prosecutions will invariably involve a substantial repetition of evidence. As Justice Callahan aptly observed in his dissenting opinion below: "The practical result of the majority's opinion will be to force the state to bring both charges in the same proceeding; a result previously not required by the double jeopardy clause." *State v. Lonergan*, 213 Conn. at 96 (Callahan, J., dissenting); Appendix at A26-A27.

### B. State And Federal Court Decisions Are In Conflict As To The Appropriate Double Jeopardy Analysis To Be Undertaken In Successive Prosecution Cases

The decision of the Connecticut Supreme Court exemplifies the conflict prevailing in double jeopardy jurisprudence. Based upon differing interpretations of *Illinois v. Vitale, supra*, some courts have looked to the character and quantum of proof in a successive prosecution while others have followed a strict *Blockburger* analysis.

In adopting the former course, the Connecticut court followed the lead of a number of federal and state courts

adopting a similar "overlap of proof" standard. These courts have interpreted dicta in *Vitale* to mandate an additional double jeopardy protection in successive prosecution cases, a protection warranting an examination of the actual evidence offered at trial.[1] Under this new

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[1] These courts have generally pointed to the following dicta in *Vitale* to support this conclusion:

> In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977) . . .
>
> By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.

*Illinois v. Vitale*, 447 U.S. at 420-21.

Although this dicta has led some courts to look to the actual evidence offered at trial, this Court has never applied the actual evidence test to bar a second trial on double jeopardy grounds. *Thigpen v. Roberts*, 468 U.S. 27, 39 (1984) (Rehnquist, J., dissenting); *See People v. Jackson*, 118 Ill.2d 179, 514 N.E.2d 983, 985 (1987) ("It is apparent that the dicta of *Vitale* . . . carries little weight with the [United States] Supreme Court since it has not been cited by that court in subsequent

(Continued on following page)

standard two offenses may be considered the same for double jeopardy purposes, despite dissimilar statutory elements, where the same evidence proves both offenses. *See, e.g., Rubino v. Lynaugh*, 845 F.2d 1266 (5th Cir. 1988); *United States v. Ragins*, 840 F.2d 1184 (4th Cir. 1988); *Flittie v. Solem*, 775 F.2d 933 (8th Cir. 1985), *cert. denied*, 475 U.S. 1025 (1986); *State v. DeLuca*, 108 N.J. 98, 527 A.2d 1355, *cert. denied*, 484 U.S. 944 (1987); *May v. State*, 726 S.W.2d 573 (Tex. Crim. App. 1987); *State v. Carter*, 291 S.C. 385, 353, S.E.2d 875 (1987).

Numerous other courts have reached a contrary conclusion. These courts construe *Vitale* as calling for the strict application of *Blockburger* in successive prosecution cases and continue to rely on an examination of the statutory elements, without resort to the evidence adduced at trial. *See, e.g., United States v. Rosenberg*, ___ U.S. ___, 46 Crim. Law Rptr. 1186 (D.C. Cir.) (November 29, 1989); *United States v. Benton*, 852 F.2d 1456 (6th Cir.), *cert. denied sub nom., Campbell v. United States*, ___ U.S. ___, 109 S.Ct. 555 (1988); *United States v. Genser*, 710 F.2d 1426 (10th Cir. 1983); *United States v. Brooklier*, 637 F.2d 620 (9th Cir. 1980), *cert. denied*, 450 U.S. 980 (1981); *State v. Seats*, 131 Ariz. 89, 638 P.2d 1335 (1981) (en banc); *Carlson v. State*, 405 So.2d 173 (Fla. 1981); *People v. Jackson*, 118 Ill.2d 179, 514 N.E.2d 983 (1987), overruling *People v. Zegart*, 83

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decisions, and is not consistent with the court's decisions either before or after *Vitale*"), overruling *People v. Zegart*, 83 Ill.2d 440, 415 N.E.2d 341 (1980), *cert. denied*, 452 U.S. 948 (1981).

Ill.2d 440, 415 N.E.2d 341 (1980), *cert. denied*, 452 U.S. 948 (1981).

Moreover, Justices of this Court themselves have acknowledged ambiguities in the *Vitale* decision in the multiple prosecution context. *See Thigpen v. Roberts*, 468 U.S. at 33-40 (Rehnquist, J., dissenting); *Illinois v. Zegart*, 452 U.S. at 948-51 (Burger, C.J., dissenting from denial of certiorari). That there is a need for clarification is evidenced by this Court's recent granting of a petition for certiorari in *Grady v. Corbin*, ___ U.S. ___, 58 U.S.L.W. 3300 (November 7, 1989). There the defendant pleaded guilty to driving while intoxicated and driving on the wrong side of the road. The state later sought to prosecute him on homicide and assault charges. The New York Court of Appeals agreed that the traffic offenses were not the same as the homicide and assault offenses under *Blockburger*. Relying on the dicta in *Vitale*, the court concluded, however, that the latter prosecution was barred by the Double Jeopardy Clause because the state would rely on the acts underlying the traffic offenses to prove the homicide and assault charges.

If these varied precedents demonstrate anything, it is the troubling trend toward inconsistency and unpredictability in double jeopardy cases involving successive prosecutions. Certiorari review of this case would resolve the split among the courts as to the nature of double jeopardy analysis in such prosecutions and, in so doing, lead to more consistent interpretations of the Double Jeopardy Clause. And consistency clearly is needed by the courts and prosecutors who must determine how and when successive criminal charges may constitutionally be brought against an accused.

## CONCLUSION

The Connecticut Supreme Court has embarked upon a theory of constitutional analysis which bars, as a violation of double jeopardy, successive prosecutions involving different crimes proved by the same evidence. Its decision exemplifies an expansive interpretation of double jeopardy protections proliferating nationally and illustrates the pressing need for guidance from this Court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

THE STATE OF CONNECTICUT

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## APPENDIX

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## Opinion from Connecticut Supreme Court

*State of Connecticut v. John Lonergan*
(13640)

Healey, Callahan, Glass, Covello and Hull, Js.

The state, with the permission of the trial court, appealed to the Appellate Court from the trial court's judgment dismissing the information charging the defendant with operating a motor vehicle while under the influence of intoxicating liquor in connection with a fatal motor vehicle accident. In a prior proceeding based on the same accident, the trial court had granted the defendant's motion for a judgment of acquittal of the crime of manslaughter in the second degree with a motor vehicle while intoxicated after it determined that the state had failed to sustain its burden of proving that the defendant's intoxication had caused the victim's death. The Appellate Court affirmed the trial court's determination that the subsequent prosecution of the defendant for operating a motor vehicle while under the influence of intoxicating liquor was barred by principles of double jeopardy, and the state, on the granting of certification, appealed to this court. *Held* that because the state intended to offer the same evidence in its prosecution for operating a motor vehicle while under the influence of intoxicating liquor as it had presented in the prior prosecution, the subsequent prosecution was barred, notwithstanding the fact that each of those offenses requires proof of an element that the other does not require.

*(One justice dissenting)*
Argued October 5 – decision released
November 28, 1989

Information charging the defendant with the crime of operating a motor vehicle while under the influence of

intoxicating liquor, brought to the Superior Court in the judicial district of Hartford-New Britain, geographical area number fourteen, where the court, *Mack, J.*, granted the defendant's motion to dismiss the information and rendered judgment thereon, from which the state, on the granting of permission, appealed to the Appellate Court, *Dupont, C.J., Daly* and *O'Connell, Js.*; judgment affirming the trial court's decision, from which the state, on the granting of certification, appealed to this court. *Affirmed.*

*Geoffrey E. Marion,* deputy assistant state's attorney, with whom, on the brief, were *John M. Bailey,* state's attorney, *Alan Reisner,* assistant state's attorney, and *Maria Kahn,* former legal intern, for the appellant (state).

*Raymond T. DeMeo,* with whom were *James A. Wade* and, on the brief, *Sally S. King,* for the appellee (defendant).

GLASS, J. This appeal involves the issue of whether a charge brought against a defendant in a second prosecution constitutes, for double jeopardy purposes, the "same offense" for which the defendant has already been tried. In particular, the question presented is whether this court should make this determination simply by examining the statutory elements of the crimes, as set forth in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), or in addition, as suggested by *In re Nielsen,* 131 U.S. 176, 9 S.Ct. 672, 33 L.Ed. 118 (1889), and its progeny, by examining the record to determine if the state will rely on the same evidence in the latter prosecution as it used in the former.

The Appellate Court's opinion revealed the following undisputed facts and procedural history of the case. See

*State v. Lonergan*, 16 Conn. App. 358, 548 A.2d 718 (1988). On May 22, 1985, the defendant, John Lonergan, was driving a car on Airport Road in Hartford. At approximately 9 p.m., the defendant's vehicle collided with a motorcycle operated by Scott Sementilli. The defendant was arrested and charged with operating a motor vehicle while under the influence of liquor or drugs in violation of General Statutes § 14-227a.[1] On the following day, Sementilli died as a result of the injuries he sustained during the collision. The defendant was subsequently arrested, and charged with manslaughter in the second degree with a motor vehicle while intoxicated in violation of General Statutes § 53a-56b.[2] The defendant pleaded not guilty to both charges.

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[1] At the time of the incident, General Statutes (Rev. to 1985) § 14-227a provided in pertinent part: "OPERATION WHILE UNDER THE INFLUENCE OF LIQUOR OR DRUG OR WHILE IMPAIRED BY LIQUOR. (A) OPERATION WHILE UNDER THE INFLUENCE. No person shall operate a motor vehicle on a public highway of this state or on any road of a district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any private road on which a speed limit has been established in accordance with the provisions of section 14-218a, or in any parking areas for ten or more cars or on any school property while under the influence of intoxicating liquor or any drug or both."

[2] At the time of the incident, General Statutes (Rev. to 1985) § 53a-56b provided: "MANSLAUGHTER IN THE SECOND DEGREE WITH A MOTOR VEHICLE WHILE INTOXICATED: CLASS C FELONY. (a) a person is guilty of manslaughter in the second degree with a motor vehicle while intoxicated when, in consequence of his intoxication while operating a motor vehicle, he causes the death of another

(Continued on following page)

The state elected to sever the two counts and proceeded to trial on the manslaughter count only. The manslaughter count was tried to the court and, at the close of the state's case-in-chief, the defendant moved for a judgment of acquittal. The trial court ruled that the state had failed to prove beyond a reasonable doubt that the defendant's alleged intoxication had caused the death of Sementilli and, therefore, granted the defendant's motion for judgment of acquittal. The state then sought to prosecute the defendant for operating a motor vehicle while under the influence of liquor. The defendant moved for a dismissal of the information on the ground that such a second prosecution was barred by the double jeopardy clause of the fifth amendment to the United States Constitution and article first, § 9 of the Connecticut constitution. The trial court ruled that the defendant's constitutional right against double jeopardy prevented the state from prosecuting him for operating a motor vehicle while under the influence. The state then appealed the trial court's ruling to the Appellate Court.

The Appellate Court affirmed the trial court's dismissal of the information charging the defendant with operating under the influence, and on February 22, 1989,

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person. For the purposes of this section, 'intoxication' shall include intoxication by alcohol or by drug or both.

"(b) Manslaughter in the second degree with a motor vehicle while intoxicated is a class C felony and the court shall suspend the motor vehicle operator's license or nonresident operating privilege of any person found guilty under this section for one year."

this court granted the state's petition for certification, limited to this issue: "Did the Appellate Court err in holding that the double jeopardy clause bars a prosecution on a charge of operating a motor vehicle while under the influence of intoxicating liquor after acquittal of a charge of manslaughter in the second degree with a motor vehicle while intoxicated arising out of the same incident?" The state argues that the Appellate Court erred in holding that the prosecution of the defendant on the charge of operating a motor vehicle while under the influence of liquor was barred by the double jeopardy clause. Specifically, the state contends that the Appellate Court misconstrued both federal and state law pertaining to what constitutes double jeopardy in successive prosecution cases. In addition, the state maintains that the precedent set by the appellate Court's decision is contrary to the purposes of the double jeopardy clause. We do not agree and, therefore, affirm the judgment of the Appellate Court.

I

The double jeopardy clause of the fifth amendment to the United States constitution provides that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const., amend. V. This constitutional guarantee is applicable to the states through the due process clause of the fourteenth amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). In addition, although the Connecticut constitution does not include a specific double jeopardy provision, this court "has long recognized as a fundamental principle of common law that no one shall be put in

jeopardy more than once for the same offense." *State v. Langley*, 156 Conn. 598, 600-601, 244 A.2d 366 (1968), cert. denied, 393 U.S. 1069, 89 S.Ct. 726, 21 L.Ed.2d 712 (1969). Therefore, the due process guarantees provided by article first, § 9 of the Connecticut constitution have been held to encompass the protection against double jeopardy. *Kohlfuss v. Warden*, 149 Conn. 692, 695, 183 A.2d 626, cert. denied, 371 U.S. 928, 83 S.Ct. 298, 9 L.Ed.2d 235 (1962). The constitutional prohibition of double jeopardy has been held to consist of three separate guarantees: (1) "It protects against a second prosecution for the same offense after acquittal. [(2)] It protects against a second prosecution for the same offense after conviction. [(3)] And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

The state argues that the Appellate Court erred in holding that manslaughter in the second degree with a motor vehicle while intoxicated was the "same offense" as operating a motor vehicle under the influence of liquor, and thus the defendant's acquittal on the manslaughter count barred the state from prosecuting him on the count of operating while under the influence. The state asserts that the determination of whether the two crimes constituted the "same offense" should have been made *solely* by applying the test set forth in *Blockburger v. United States*, supra. In *Blockburger*, the United States Supreme Court considered whether several offenses charged in a single prosecution were sufficiently different to permit the imposition of multiple sentences without violating the double jeopardy clause. Id., 304. In so doing,

the United States Supreme Court, emphasizing a comparison of the elements of the offenses, fashioned the following test: "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Id. This test is a technical one and examines only the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial *Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975); see *State v. McCall*, 187 Conn. 73, 90, 444 A.2d 896 (1982).

The United States Supreme Court, in *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), extended the *Blockburger* test to apply to successive prosecution cases. In *Brown*, the state of Ohio had attempted to prosecute the defendant for the crime of auto theft after he had already been convicted of joyriding (taking or operating a motor vehicle without the owner's consent). Id., 162-64. Applying the *Blockburger* test, the court concluded that since joyriding did not require proof of an element distinct from auto theft, it was a lesser included offense of auto theft, and therefore the two crimes constituted the "same offense." Id., 168-69.

In applying the *Blockburger* test to the present case, the Appellate Court correctly concluded that under this test manslaughter with a motor vehicle while intoxicated was not the same offense as operating under the influence, as each offense required proof of a fact that the other did not. See *State v. Lonergan*, supra, 366. A conviction of manslaughter in the second degree with a motor

vehicle while intoxicated requires proof of (1) operation of a motor vehicle (2) while intoxicated (3) which causes the death of another person. General Statutes § 53a-56b; see footnote 2, supra. A conviction of operating a motor vehicle while under the influence of intoxicating liquor or drugs, requires proof of (1) operation of a motor vehicle (2) on a public highway or on one of the other designated areas (3) while under the influence of intoxicating liquor or drugs. General Statutes § 14-227a; see footnote 1, supra. As the Appellate Court accurately noted, "[w]hile these two offenses share certain elements, each contains an element that the other does not. A conviction for operating a motor vehicle while under the influence of alcohol must be supported by proof that the defendant operated a motor vehicle on one of the locations specified in the statute; such a geographical element is not pertinent to a conviction for manslaughter with a motor vehicle while intoxicated. A conviction for manslaughter with a motor vehicle while intoxicated must be supported by proof that another person died as a result of the defendant's intoxication; such a death element is not pertinent to a conviction for operating a motor vehicle while under the influence of alcohol. For these reasons, the two offenses are not the same under the *Blockburger* test." *State v. Lonergan*, supra, 367.

The Appellate Court, however, did not end its double jeopardy analysis at this point. Rather, the Appellate Court concluded that the *Blockburger* test was not the only applicable test for determining whether successive prosecutions impermissibly involve the "same offense." Invoking the United States Supreme Court decision of *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d

228 (1980), the Appellate Court held: "[I]f the same evidence offered to prove a violation of the offense charged in the first prosecution is the sole evidence offered to prove an element of the offense charged in the second prosecution, then prosecution of the second offense is barred on double jeopardy grounds, regardless of whether either offense requires proof of a fact that the other does not." *State v. Lonergan*, supra, 368. The Appellate Court then concluded that, since the state was going to use the same evidence in its prosecution of the defendant for operating under the influence as it had used in its previous prosecution of the defendant for manslaughter, the second prosecution was barred as violative of the double jeopardy clause. Id., 378.

The state argues that the Appellate Court's departure from a strict *Blockburger* analysis was contrary to United States Supreme Court precedent and, accordingly, reversible error. We do not agree. Although the United States Supreme Court in *Brown v. Ohio*, supra, extended the *Blockburger* test to apply to successive prosecution cases, the court did not state that the *Blockburger* test was the exclusive method for determining whether successive prosecutions involved the "same offense" in violation of the double jeopardy clause. In *Brown*, the court concluded that the two crimes of auto theft and joyriding failed to satisfy the *Blockburger* test and, therefore, were the same offense for double jeopardy purposes. Significantly, however, the *Brown* court did not end its inquiry at this point. Rather, the court proceeded to declare that: "The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense. Even if two offenses are sufficiently

different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues already resolved by the first." *Brown v. Ohio*, supra, 166 n.6.

To support this assertion, the *Brown* court relied on *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), and *In re Nielsen*, supra, positing that these cases offer double jeopardy protection in successive prosecution cases beyond that of *Blockburger*. The court stated: "[I]n *Ashe* . . . where an acquittal on a charge of robbing one of several participants in a poker game established that the accused was not present at the robbery, the Court held that principles of collateral estoppel embodied in the Double Jeopardy Clause barred prosecutions of the accused for robbing the other victims. And in *In re Nielsen* . . . the Court held that a conviction of a Mormon on a charge of cohabiting with his two wives over a 2 1/2-year period barred a subsequent prosecution for adultery with one of them on the day following the end of that period.

"In both cases, strict application of the *Blockburger* test would have permitted imposition of consecutive sentences had the charges been consolidated in a single proceeding. In *Ashe*, separate convictions of the robbery of each victim would have required proof in each case that a different individual had been robbed. . . . In *Nielsen*, conviction for adultery required proof that the defendant had sexual intercourse with one woman while married to another; conviction for cohabitation required proof that the defendant lived with more than one woman at the same time. Nonetheless, the Court in both cases held the separate offenses to be the 'same' for

[double jeopardy purposes]." *Brown v. Ohio*, supra, 166 n.6. In particular, the *Nielsen* court held: "[W]here . . . a person has been tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense." *In re Nielsen*, supra, 188.

Additionally, 1977, the United States Supreme Court in *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), relied on *Nielsen* to bar a second prosecution when the *Blockburger* test would have permitted it.[3] *Harris* involved a prosecution for robbery after a conviction for felony murder in which the robbery was the underlying felony. Citing the *Nielsen* "incidents" language, and failing to cite *Blockburger* at all, the court, in a per curiam decision, held: "When, as here, conviction of a greater crime, murder, cannot be had without conviction of the lesser crime, robbery with firearms, the Double Jeopardy Clause bars prosecution for the lesser crime after conviction of the greater one." *Harris v. Oklahoma*, supra, 682.

Three years later, *Harris* was followed by a similar analysis and decision in *Illinois v. Vitale*, supra. In *Vitale*,

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[3] "The felony murder statute at issue in *Harris [v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977),] did not on its face require proof of a robbery to establish a conviction, and the robbery statute likewise did not require proof of a murder, thus under a strict application of the *Blockburger* test the two statutes would not be held to proscribe the same offense." Note, "Multiple Prosecutions and Punishments Under RICO: A Chip Off the Old *'Blockburger,'* " 52 Cinn. L. Rev. 467, 482 (1983).

the defendant was involved in an automobile accident that resulted in two deaths. He was convicted for the traffic offense of failing to reduce speed to avoid an accident. The state subsequently attempted to prosecute him for involuntary manslaughter, but the Illinois Supreme Court held that the two offenses were the same for double jeopardy purposes. Id., 412-15. The United States Supreme Court then granted certiorari, and vacated the judgment of the Illinois Supreme Court and remanded, employing what was, in effect, a two-tiered analytical framework for determining whether the two offenses were the same. The court stated: "If, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and *Vitale's* trial on the latter charge would constitute double jeopardy under *Brown v. Ohio*. In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that it is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown* and our later decision in *Harris v. Oklahoma*." Id., 419-20.

In short, the court in *Vitale* indicated that there are two ways of detecting double jeopardy violations in successive prosecution cases. First, the *Blockburger* test may categorize the two offenses as being the same. Second, an examination of the evidence may be undertaken to determine if the second offense requires proof that was already

offered to prove the first offense. See G. Thomas, "The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition," 71 Iowa L.Rev. 323, 350-52 (1986). The court made it clear, however, that this additional protection is not implicated by the "mere possibility" that the second prosecution will require proof of the same conduct as the first. Rather, the state must actually rely on the same conduct or concede that it will do so. Therefore, because of the *Vitale* court's "doubts about the relationship under Illinois law between the crimes of manslaughter and a careless failure to reduce speed to avoid an accident, and because the reckless act or acts the State [would] rely on to prove manslaughter [were] still unknown," the court vacated the judgment of the Illinois Supreme Court and remanded the case to that court. *Illinois v. Vitale*, supra, 421.

Thus, we are not persuaded that the Appellate Court contravened United States Supreme Court precedent in *State v. Lonergan*, supra. In fact, many other courts have interpreted United States Supreme Court precedent as granting such additional double jeopardy protection in successive prosecution cases. See, e.g., *Rubina v. Lynaugh*, 845 F.2d 1266 (5th Cir. 1988); *United States v. Ragins*, 840 F.2d 1184 (4th Cir. 1988); *Flittie v. Solem*, 775 F.2d 933 (8th Cir. 1985), cert. denied, 475 U.S. 1025, 106 S.Ct. 1223, 89 L.Ed.2d 333 (1986); *Jordan v. Virginia*, 653 F.2d 870 (4th Cir. 1980); *United States v. Black*, 605 F.Sup. 1027 (D.C. 1985); *United States v. Haggerty*, 528 F.Sup. 1286 (D.Colo. 1981); *State v. McGaughy*, 505 So.2d 399 (Ala.Crim.App. 1987); *State v. Burroughs*, 246 Ga. 393, 271 S.E.2d 629 (1980); *State v. DeLuca*, 108 N.J. 98, 527 A.2d 1355, cert. denied, 484 U.S. 944, 108 S.Ct. 331, 98 L.Ed.2d 358 (1987); *State v.*

*Carter*, 291 S.C. 385, 353 S.E.2d 875 (1987); *State v. Grampus*, 288 S.C. 395, 343 S.E.2d 26 (1986); *May v. State*, 726 S.W.2d 573 (Tex.Crim.App. 1987).

The state appropriately indicates, however, that a number of courts have construed United States Supreme Court precedent as suggesting a strict *Blockburger* analysis. See, e.g., *United States v. Benton*, 852 F.2d 1456 (6th Cir.), cert. denied sub nom. *Cambell v. United States*, ___ U.S. ___, 109 S.Ct. 555, 102 L.Ed.2d 582 (1988); *United States v. Genser*, 710 F.2d 1426 (10th Cir. 1983); *United States v. Brooklier*, 637 F.2d 620 (9th Cir. 1980), cert. denied, 450 U.S. 980, 101 S.Ct. 1514, 67 L.Ed.2d 815 (1981); *State v. Seats*, 131 Ariz. 89, 638 P.2d 1335 (1981) (en banc); *Carlson v. State*, 405 So.2d 173 (Fla. 1981); *People v. Jackson*, 118 Ill.2d 179, 514 N.E.2d 983 (1987), overruling *People v. Zegart*, 83 Ill.2d 440, 415 N.E.2d 341 (1980), cert. denied, 452 U.S. 948, 101 S.Ct. 3094, 69 L.Ed.2d 961 (1981). As the Appellate Court noted: "These courts appear to apply an unmodified *Blockburger* analysis to successive prosecution cases for basically three reasons. The first reason is the statement in *Vitale* that *Blockburger* is 'the principal test for determining whether two offenses are the same for the purposes of barring successive prosecutions.' *Illinois v. Vitale*, supra, 416; see, e.g., *United States v. Brooklier*, supra, 624." *State v. Lonergan*, supra, 373. The second reason is a statement made by Justice Rehnquist in his dissenting opinion in *Thigpen v. Roberts*, 468 U.S. 27, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984).[4] In his dissent, Justice

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[4] "In *Thigpen v. Roberts*, 468 U.S. 27, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984), the defendant was initially charged with

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Rehnquist made the following assertion regarding *Vitale:* " 'I am reasonably sure that the Court did not intend to transmute the traditional double jeopardy analysis from an either "up or down" inquiry based on the evidence required to prove the statutory elements of a crime into a "substantial claim" inquiry based on the evidence the State introduced at trial.' [*Thigpen v. Roberts*, supra, 36] (Rehnquist, J., dissenting). The third reason is the fact that three justices of the United States Supreme Court dissented to the denial of certiorari in a case where the Supreme Court of Illinois held that the double jeopardy clause had been violated because the state intended to

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reckless driving, driving while his license was revoked, driving on the wrong side of the road, and driving while intoxicated, all offenses arising from a fatal automobile accident. After the defendant was convicted of these four misdemeanors and while his appeal was pending, the defendant was indicted for manslaughter based on the same accident, and was convicted. The defendant brought a habeas corpus action in the federal District Court, which held that the manslaughter prosecution violated the double jeopardy clause and that substitution of a felony charge covering the same conduct for which the defendant had been convicted of the misdemeanors violated the due process clause of the fourteenth amendment.

"The Fifth Circuit Court of Appeals affirmed, relying solely on the double jeopardy argument. *Roberts v. Thigpen*, 693 F.2d 132 (5th Cir. 1982). The United States Supreme Court affirmed on the due process ground, without deciding the double jeopardy issue. In dissent, Justice Rehnquist stated: 'I believe that the Court is obligated to confront the State's contention that the Court Appeals misapplied the Double Jeopardy Clause of the Fifth Amendment in this case. The Court being unwilling to undertake that obligation, I turn to it in dissent. . . .' " *State v. Lonergan*, 16 Conn.App. 358, 373 n.12, 548 A.2d 718 (1988).

use the same factual basis which supported the first conviction as the basis for the second conviction. *People v. Zegart*, supra, 445. The dissent emphasized that courts were required to look to the statutory elements of the first and second charges, not to the similarities of facts in the prosecution's proof. *Illinois v. Zegart*, 452 U.S. 948, 951, 101 S.Ct. 3094, 69 L.Ed.2d 961 (1981). (Burger, C.J., dissenting from denial of certiorari); see, e.g., *People v. Jackson*, supra." *State v. Lonergan*, supra, 373-74.

Like the Appellate Court, we find these reasons unpersuasive. First, although the United States Supreme Court in *Vitale* labeled the *Blockburger* test the "principle test" for determining whether two offenses are the same for purposes of barring successive prosecutions, the court did not state that it was *the* test. In fact, the court has stated: "The *Blockburger* test is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." *Brown v. Ohio*, supra, 166 n.6.[5] Second, Justice Rehnquist's views regarding *Vitale* were set forth in dissent in *Thigpen*, and thus were not the expressed views of the majority of the court. Further, Justice Rehnquist's assertion that *Vitale* mandated a strict application of *Blockburger* is refuted by the fact

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[5] Furthermore, the *Blockburger* test is not talismanic. For example, in single prosecution cases it is not definitive in determining whether multiple punishments may be imposed. Rather, it is only a rule of statutory construction, utilized in what is "essentially a factual inquiry as to legislative intent [rather than] a conclusive presumption of law." *Garrett v. United States*, 471 U.S. 773, 779, 105 S.Ct. 2407, 85 L.Ed.2d 764 (1985); see *Whalen v. United States*, 445 U.S. 684, 708, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (Rehnquist, J., dissenting).

that the *Vitale* court remanded the case for further factual clarification regarding what the state's proof was to be in the subsequent trial. If Justice Rehnquist were correct that only a *Blockburger* comparison of the statutory elements was prescribed by *Vitale*, then it would have made no difference what the state's proof would have been in the subsequent trial. See G. Thomas, "The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition," 71 Iowa L.Rev. 323, 352 (1986). Finally, "the impact of the fact that three justices dissented to the denial of certiorari in *Zegart* is ameliorated by the impact of the denial itself. Although denials of certiorari by the United States Supreme Court have no precedential authority, the denial in *Zegart* certainly does not refute the argument that a majority of the court considers the *Blockburger* test as modified by inquiry into the repetition of proof to be the proper double jeopardy approach in successive prosecution cases. See, e.g., *People v. Gartner*, 143 Ill.App.3d 113, 491, N.E.2d 927 (1986), overruled by *People v. Jackson*, supra." *State v. Lonergan*, supra, 375-76.

In sum, the Appellate Court's extension of double jeopardy protection in successive prosecution cases in excess of that offered by *Blockburger* is not contrary to United States Supreme Court precedent, and therefore, does not constitute reversible error.

II

Next, the state argues that the Appellate Court's failure to employ an unmodified *Blockburger* analysis was not in accord with this court's prior decisions. The state concedes that the question of whether to provide

increased double jeopardy protection beyond that offered by *Blockburger* is one of first impression for this court. The state argues, however, that this court has "given a number of indications that it does not subscribe to the Appellate Court's interpretation of *Vitale*." We disagree. The state supports its assertion by citing *State v. McCall*, 187 Conn. 73, 90, 444 A.2d 896 (1982), and *State v. Truppi*, 182 Conn. 449, 468, 438 A.2d 712 (1980), cert. denied, 451 U.S. 941, 101 S.Ct. 2024, 68 L.Ed.2d 329 (1981), for the proposition that in single prosecution cases this court has held that evidence should not be examined. These cases are inapposite, however, as they only refer to *single* prosecution cases, and there is no dispute that *Vitale* reaffirmed the application of the traditional *Blockburger* test in single prosecution cases.[6] Therefore, this court's prior decisions have not indicated what analytical framework should be utilized to determine whether successive prosecutions involve the "same offense" in violation of the double jeopardy clause.[7]

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[6] As the Appellate Court noted: "No Connecticut cases, including the ones cited by the state, hold that *Blockburger* applies without modification in successive prosecution cases. In fact, each case cited by the state, and all Connecticut appellate court cases that have cited *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980), for the proposition that we do not examine the evidence at trial when applying the *Blockburger* test, involved single trial prosecutions. None of the cases revealed by our research on this issue involved successive prosecutions." *State v. Lonergan*, 16 Conn.App. 358, 371 n.9, 548 A.2d 718 (1988).

[7] In addition, the state argues that the Appellate Court's decision is in conflict with this court's decisions granting the state broad discretion in how it proceeds against an accused.

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III

Finally, the state contends that the Appellate Court's establishment of double jeopardy protection in successive prosecution cases beyond that offered by *Blockburger* fails to serve the purposes of the double jeopardy clause. We disagree. The ideal embodied in the double jeopardy clause is of ancient origins,[8] and its essential role in an individual's protection against government tyranny cannot be doubted.[9] Justice Black, in *Green v. United*

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See *State v. Ellis*, 197 Conn. 436, 474, 497 A.2d 974 (1985); *State v. Silver*, 139 Conn. 234, 243-44, 93 A.2d 154 (1952). But, as the Appellate Court appropriately notes: "Although the state may elect to sever for trial charges arising out of the same transaction or occurrence, it must do so in full cognizance of the enhanced double jeopardy protection afforded to the defendant as a result of forcing him to withstand more than one criminal prosecution." *State v. Lonergan*, 16 Conn.App. 358, 379, 548 A.2d 718 (1988).

[8] "Historians have traced the origins of our constitutional guarantee against double jeopardy back to the days of Demosthenes, who stated that 'the laws forbid the same man to be tried twice on the same issue. . . .' " *Whalen v. United States*, 445 U.S. 684, 699, 100 S.Ct. 1432, 63 L.Ed.2d 715 (1980) (Rehnquist, J., dissenting) quoting 1 Demosthenes 589 (J. Vince trans. 4th ed. 1970). "The date of Demosthenes quotation was 355 B.C., M. Friedland, Double Jeopardy 16 n.7 (1969), and the principle underlying the double jeopardy clause is, therefore, at least 234[4] years old." G. Thomas, "The Prohibition of Successive Prosecutions for the Same Offense: In Search of a Definition," 71 Iowa L.Rev. 323, 315 n.8 (1986).

[9] See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) ("permitting the

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*States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), wrote: "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

In short, "[s]uccessive-prosecution cases involve the core values of the Double Jeopardy Clause . . . .Where successive prosecutions are involved, the Double Jeopardy Clause protects the individual's interest in not having to twice 'run the gauntlet.' " *People v. Robideau*, 419 Mich. 458, 484, 355 N.W.2d 592 (1984). Thus, "[g]iven the multiplicity of offenses that may arise from a single criminal transaction, the formalistic *Blockburger* test, with its narrow focus on the technical elements of the offenses charged is inadequate to vindicate this constitutional guarantee against retrial. The general test for determining whether successive prosecutions involve the 'same offense' is therefore a more flexible and pragmatic one, which focuses not on the formal elements of the two

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sovereign freely to subject the citizen to a second trial for the same offense would arm Government with a potent instrument of oppression"); *Benton v. Maryland*, 395 U.S. 784, 795, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969) ("the fundamental nature of the guarantee against double jeopardy can hardly be doubted").

offenses but rather on the proof actually utilized to establish them."[10] *United States v. Ragins*, supra, 1188.

Accordingly, the Appellate Court's conferral of expanded protection in successive prosecution cases clearly serves the purposes of the double jeopardy clause.

IV

In conclusion, we adopt the reasoning of the Appellate Court and hold that in successive prosecution cases "if the same evidence offered to prove a violation of the offense charged in the first prosecution is the sole evidence offered to prove an element of the offense charged

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[10] The Supreme Court of Alaska has stated: "Although [the *Blockburger*] test has been widely used by the courts, it has been increasingly criticized as not coping satisfactorily with the problem it was designed to solve. Legislative refinement of an essentially unitary criminal episode into numerous separate violations of the law has resulted in a proliferation of offenses capable of commission by a person at one time and in one criminal transaction. Since each violation by definition will usually require proof of a fact which the others do not, application of the [*Blockburger*] test will mean that each offense is punishable separately. But as the separate violations multiply by legislative action, the likelihood increases that a defendant will actually be punished several times for what is really and basically one criminal act." *Whitton v. State*, 479 P.2d 302, 306 (Alaska 1970).

In fact, a commentator has noted that the *Blockburger* test would permit six successive trials for a single act of sexual intercourse (adultery, fornication, bastardy, rape, incest, and impairing the morals of a minor). See Note, "The Double Jeopardy Clause as a Bar to Reintroducing Evidence," 89 Yale L.J. 962, 967 n.27 (1980).

in the second prosecution, then prosecution of the second offense is barred on double jeopardy grounds, regardless of whether either offense requires proof of a fact that the other does not." *State v. Lonergan*, supra, 368. Applying this test to the present case, we further hold that the prosecution of the defendant for operating a motor vehicle while under the influence of liquor or drugs in violation of General Statutes § 14-227a is barred, under the facts of this case, as violative of the double jeopardy clause. Given the record before us, and the fact that the state has so conceded, it is evident that the state intends to relitigate the issue of whether the defendant was operating while under the influence of liquor.[11] The record clearly indicates that in the second prosecution for operating while under the influence the state will rely on and seek to prove the same act of operating while intoxicated that was necessary to prove the manslaughter charge in the first prosecution. Thus, since the defendant has already been acquitted of conduct that is here shown to

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[11] Although the issue in the first prosecution was whether the defendant's conduct was in consequence of his "intoxication," and in the second prosecution the issue would be whether the defendant was operating a motor vehicle while "under the influence," as the Appellate Court and the trial court both correctly stated: " 'While it is possible to be under the influence of intoxicating alcohol while not being intoxicated, it is impossible to be intoxicated while not, at the same time, be[ing] under the influence of alcohol.' " *State v. Lonergan*, 16 Conn. App. 358, 361, 548 A.2d 718 (1988); see *Sanders v. Officers Club of Connecticut, Inc.*, 196 Conn. 341, 349-50, 493 A.2d 184 (1985). Thus, the issue of whether the defendant was operating "under the influence" was necessarily litigated in the first trial.

be a necessary element of the less serious crime for which he has been charged, his claim of double jeopardy is substantial under *In re Nielsen*, supra, and its progeny and, therefore, this second prosecution is barred on double jeopardy grounds.

The judgment of the Appellate Court is affirmed.

In this opinion HEALEY, COVELLO and HULL, Js., concurred.

CALLAHAN, J., dissenting. I disagree with the majority's holding that in a successive prosecution case, two offenses can be considered the "same offense" for double jeopardy purposes where the same evidence or conduct proves both offenses even though the same two offenses would *not* be considered the same offense if brought in a single prosecution. I would reverse the Appellate Court and hold that the *Blockburger* test should be applied in successive prosecution cases to determine what constitutes the "same offense" for double jeopardy purposes.

*Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980), affirmed that the *Blockburger* test, as set forth in *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), is "the principal test for determining whether two offenses are the same for purposes of barring successive prosecutions. Quoting from *Blockburger v. United States*, 284 U.S. 299, 304 [52 S.Ct. 180, 76 L.Ed. 306] (1932), which in turn relied on *Gavieres v. United States*, 220 U.S. 338, 342-343 [31 S.Ct. 421, 55 L.Ed. 489] (1911), [the United States Supreme Court] held that ' "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there

are two offenses or only one, is whether each provision requires proof of a fact which the other does not." ' 432 U.S., at 166. [The United States Supreme Court] recognized that the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial." *Illinois v. Vitale*, supra, 416. "[T]he *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975). "The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the [less serious offense] to establish an element of [the more serious offense] would not be sufficient to bar the latter prosecution." *Illinois v. Vitale*, supra, 419.[1] Thus, the United States Supreme Court has repeatedly recognized that a second prosecution will not be barred on double jeopardy grounds simply because the evidence offered in the second prosecution may be duplicative of the evidence admitted in the first.

In *Brown v. Ohio*, the court outlined the policy behind the double jeopardy clause in successive prosecution cases. "Where successive prosecutions are at stake, the

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[1] "The 'same evidence' test is not constitutionally required. It . . . has never been squarely held by this Court to be the required construction of the constitutional phrase 'same offense' in a case involving multiple trials; indeed, in that context it has been rejected. See *In re Nielson*, 131 U.S. 176 [9 S.Ct. 672, 33 L.Ed. 118 (1889)], discussed in *Abbate v. United States*, [359 U.S. 187, 201, 79 S.Ct. 666, 674, 3 L.Ed.2d 729 (1959)]." *Ashe v. Swenson*, 397 U.S. 436, 452-53, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970) (Brennan, J., concurring).

guarantee serves 'a constitutional policy of finality for the defendant's benefit.' . . . That policy protects the accused from attempts to relitigate the *facts underlying a prior acquittal* . . . and from attempts to secure additional punishment after a prior conviction and sentence . . . " (Emphasis added, citations omitted.) *Brown v. Ohio*, supra, 165-66. Here, however, the state is not attempting to relitigate the facts underlying the prior acquittal. "The trial court [in the first prosecution] ruled that the state had failed to prove beyond a reasonable doubt that the defendant's alleged intoxication had caused the death of [the victim] and, accordingly, granted the defendant's motion for judgment of acquittal." *State v. Lonergan*, 16 Conn.App. 358, 360, 548 A.2d 718 (1988).

The sole issue determined by the trial court was that the defendant's alleged intoxication was not the cause of the death of the victim as required for manslaughter in the second degree with a motor vehicle. The trial court never decided any of the elements of operating a motor vehicle while under the influence. Thus, the conduct of which the defendant was acquitted is not an element of the less serious crime for which the state now desires to prosecute him.[2]

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[2] The majority cites footnote 6 in *Brown v. Ohio*, 432 U.S. 161, 166-67, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), to support its conclusion that the *Blockburger* rule is not the sole test for determining whether successive prosecutions involve the same offense. In *Brown*, the court stated: "[E]ven if two offenses are sufficiently different to permit the imposition of consecutive sentences, successive prosecutions will be barred in some circumstances where the second prosecution requires the relitigation of factual issues *already resolved by the first*." (Emphasis

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While I agree that "the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense"; *Green v. United States*, 355 U.S. 184, 187, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957), this principle only applies when the state is attempting to relitigate *the* same offense. "[T]he United States Supreme Court has consistently declined to hold that double jeopardy requires the prosecution 'to join at one *trial* all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction.' (Emphasis added.) *Ashe v. Swenson*, [397 U.S. 436, 453-54, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)] (Brennan, J., concurring). . . ." *State v. Ellis*, 197 Conn. 436, 474, 497 A.2d 974 (1985).

Under the majority's analysis, the two offenses, operating a motor vehicle while under the influence and manslaughter in the second degree with a motor vehicle, constitute two different offenses and can be punished separately if the state brings both charges in a single trial. If, however, the state chooses to prosecute the crimes in two separate trials, they are considered the "same offense" apparently even if the first trial did not resolve the elements necessary to prove the second offense. Thus, the definition of what constitutes the "same offense" for double jeopardy purposes will vary depending upon whether the charges are brought in a single rather than a successive prosecution. The practical result of the majority's opinion will be to force the state to bring both

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added.) *Brown v. Ohio*, supra, 166-67 n.6. As mentioned, however, in this case the state is not attempting to relitigate facts already resolved by the first prosecution.

charges in the same proceedings; a result previously not required by the double jeopardy clause. The policies underlying the double jeopardy clause do not support this analysis and I cannot agree with such an inconsistent approach.

Accordingly, I dissent.

## Opinion from Connecticut Appellate Court

*State of Connecticut v. John Lonegan*
(5981)

Dupont, C. J., Daly and O'Connell, Js.

The state appealed from the trial court's dismissal of the information charging the defendant with operating a motor vehicle while under the influence of intoxicating liquor. That court determined that because the defendant had earlier been acquitted of the crime of manslaughter in the second degree with a motor vehicle while intoxicated in connection with the same accident underlying the prosecution here, his double jeopardy rights barred the subsequent prosecution. *Held* that the defendant was entitled to the protection of the double jeopardy clause because the same evidence presented in his manslaughter prosecution would have been the only evidence offered to prove the commission of operating a motor vehicle while under the influence of intoxicating liquor; accordingly, the information was properly dismissed.

Application of double jeopardy analysis to successive prosecutions, discussed.

Argued April 12 – decision released
September 27, 1988

Information charging the defendant with the crime of operating a motor vehicle while under the influence of intoxicating liquor, brought to the Superior Court in the judicial district of Hartford-New Britain, geographical area number fourteen, where the court, *Mack, J.*, granted the defendant's motion to dismiss the information and rendered judgment thereon, from which the state, on the granting of permission, appealed to this court. *No error.*

*Geoffrey Marion*, deputy assistant state's attorney, with whom on the brief, were *Alan Reisner* and *James G.*

*Clark*, assistant state's attorneys, and *Janine D'Angelo*, legal intern, for the appellant (state).

*James A. Wade*, with whom were *Raymond T. DeMeo* and, on the brief, *Sally S. King*, for the appellee (defendant).

DUPONT, C.J. The state appeals from the judgment rendered after the trial court's dismissal of the information against the defendant charging him with operating a motor vehicle while under the influence of intoxicating liquor in violation of General Statutes § 14-227a. We find no error.

This case involves the following undisputed facts. On May 22, 1985, at approximately 9 p.m., the defendant was driving a car in an easterly direction on Airport Road in Hartford. While making a left turn into a restaurant driveway, the defendant's car collided with a motorcycle, operated by Scott Sementilli, which was traveling in a westerly direction on Airport Road. The defendant was arrested and charged with operating a motor vehicle while under the influence of liquor or drugs in violation of General Statutes § 14-227a.[1] The following day, May 23,

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[1] At the time of the incident, General Statutes (Rev. to 1985 § 14-227a provided in pertinent part: "OPERATION WHILE UNDER THE INFLUENCE OF LIQUOR OR DRUG OR WHILE IMPAIRED BY LIQUOR. (a) OPERATION WHILE UNDER THE INFLUENCE. No person shall operate a motor vehicle on a public highway of this state or on any road of a district organized under the provisions of chapter 105, a purpose of which is the construction and maintenance of roads and sidewalks, or on any private road on which a speed limit has been

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1985, Sementilli died as a result of the injuries he sustained during the collision. The defendant was subsequently arrested and charged with manslaughter in the second degree with a motor vehicle while intoxicated in violation of General Statutes § 53a-56b.[2] The defendant pleaded not guilty to both of these charges.

The state elected to sever the two counts and proceeded to trial on the manslaughter count only. The manslaughter count was then tried to the court. At the close of the state's case-in-chief, the defendant moved for a judgment of acquittal. The trial court ruled that the state had failed to prove beyond a reasonable doubt that the defendant's alleged intoxication had caused the death of Sementilli and, accordingly, granted the defendant's motion for judgment of acquittal.

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established in accordance with the provisions of section 14-218a, or in any parking area for ten or more cars or on any school property while under the influence of intoxicating liquor or any drug or both."

[2] At the time of the incident, General Statutes (Rev. to 1985) § 53a-56b provided: "(a) A person is guilty of manslaughter in the second degree with a motor vehicle while intoxicated when, in consequence of his intoxication while operating a motor vehicle, he causes the death of another person. For the purposes of this section, 'intoxication' shall include intoxication by alcohol or by drug or both.

"(b) Manslaughter in the second degree with a motor vehicle while intoxicated is a class C felony and the court shall suspend the motor vehicle operator's license or nonresident operating privilege of any person found guilty under this section for one year."

The state then sought to prosecute the defendant for operating motor vehicle while under the influence of liquor. The defendant moved for a dismissal of the information charging him with operating while under the influence on the ground that the second prosecution was prohibited under the double jeopardy clauses of the federal and state constitutions. U.S. Const., amend V; Conn. Const., art. 1, § 9.

In opposition to the defendant's motion to dismiss, the state argued that the requirement in General Statutes § 53a-56b that the defendant's conduct be "in consequence of his intoxication," was distinct from the requirement in General Statues § 14-227a that the defendant be "under the influence" of liquor. That state contended that because it was possible to prove "intoxication" without having first proven that the defendant was "under the influence," § 53a=56b was not the "same offense" as § 14-227a for double jeopardy purposes. See generally *Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

The trial court explicitly rejected the state's argument and, in a memorandum of decision, stated: "While it is possible to be under the influence of intoxicating alcohol while not being intoxicated, it is impossible to be intoxicated while not, at the same time, be[ing] under the influence of alcohol."[3] On that basis, the trial court

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[3] Under our penal code, "intoxication" is defined as "a substantial disturbance of mental or physical capacities resulting from the introduction of substances into the body." General Statues § 53a-7. In *Sanders v. Officers Club of Connecticut, Inc.*,

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concluded that the defendant's constitutional right against double jeopardy prevented the state from prosecuting him under § 14-227a and, accordingly, granted the defendant's motion to dismiss the information. The state's appeal followed.

On appeal, the state has abandoned the argument that it had made to the trial court, namely, that it was possible to prove intoxication without having first proven that the defendant was under the influence. Rather, the sole claim raised by the state in its appeal is that the two offenses are not the same for double jeopardy purposes because (1) the crime of operating under the influence requires proof that the defendant operated a vehicle in

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196 Conn. 341, 349-50, 493 A.2d 184 (1985), our Supreme Court attempted to distinguish, in a meaningful way, between those qualities incidental to "intoxication" and those qualities incidental to "under the influence": "to be intoxicated is something more than to be merely under the influence of, or affected to some extent by, liquor. Intoxication means an abnormal mental or physical condition due to the influence of intoxicating liquors, a visible excitation of the passions and impairment of the judgment, or a derangement or impairment of physical functions and energies . . . When it is apparent that a person is under the influence of liquor, when his manner is unusual or abnormal and is reflected in his walk or conversation, when his ordinary judgment or common sense are disturbed or his usual will power temporarily suspended, when these or similar symptoms result from the use of liquor and are manifest, a person may be found to be intoxicated. He need not be 'dead-drunk.' It is enough if by the use of intoxicating liquor he is so affected in his act or conduct that the public or parties coming in contact with him can readily see and know this is so."

one of the geographical locations specified in the statute, an element not required by § 53a-56b, and (2) the crime of manslaughter in the second degree with a motor vehicle while intoxicated requires proof of the death of another person, an element not required by § 14-227a.

The defendant argues that we should decline to review the claim on appeal on the ground that it was not specifically raised in the trial court. Before considering the merits of this claimed error, then, we must decide whether it is properly before us. We conclude that it is.

Practice Book § 4185 provides that the appellate courts "shall not be bound to consider a claim unless it was *distinctly raised* at the trial." (Emphasis added.) "The requirement that the claim be raised 'distinctly' means that it must be 'so stated as to bring to the attention of the court the *precise* matter on which its decision is being asked.' (Emphasis added.) *Woodruff v. Butler*, 75 Conn. 679, 682, 55 A. 167 (1903)." *State v. Carter*, 198 Conn. 386, 396, 503 A.2d 576 (1986).

Although the focus of the state's legal argument in support of its claim has shifted, there can be no real doubt that the claim made on appeal was the same claim made in the trial court, namely, that the trial court should not dismiss the information charging an offense of § 14-227a because under the *Blockburger* line of cases, the offenses set forth in §§ 14-227a and 53a-56b are not the same offense for double jeopardy purposes because each offense involves proof of an element that the other does not.[4] Accordingly, we will review the merits of the state's

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[4] In its memorandum of law in opposition to the defendant's motion to dismiss the information, the state averred:

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claim of error as refined by the state on appeal. See *State v. Dabkowski*, 199 Conn. 193, 198, 506 A.2d 118 (1986).

The fifth amendment to the United States constitution declares that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb. . . ." This amendment is fully applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Although

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"The state concedes, arguendo, that the same incident underlies both statutory offenses charged against the defendant. Thus, '[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.' *Blockburger v. United States*, 284 U.S. 299, 304 [52 S.Ct. 180, 76 L.Ed. 306 (1932)]. As the defendant concedes the analysis 'precludes examination of the evidence.' *State v. McCall*, 187 Conn. 73, 90 [444 A.2d 896 (1982)], citing *Illinois v. Vitale*, 447 U.S. 410, 416 [100 S.Ct. 2260, 65 L.Ed.2d 228 (1980)]. Instead, *an examination of the elements of the two crimes is essential. State v. Goldson*, 432 U.S. 161, 166 [97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)].

"In the initial proceedings against the defendant, the State would have had to prove that (1) in the consequence of his intoxication, (2) while operating a motor vehicle, (3) the defendant caused the death of another person. In the instant case the state must prove the defendant (1) operated a motor vehicle on a public highway, (2) while under the influence of intoxicating substance." (Emphasis added.)

Our review of the state's memorandum in opposition makes clear that the claim raised therein was adequate to alert the trial court to the specific deficiency now claimed on appeal. *State v. Carter*, 198 Conn. 386, 396, 503 A.2d 576 (1986).

the Connecticut constitution does not include a specific double jeopardy provision, our Supreme Court "has long recognized as a fundamental principal of common law that no one shall be put in jeopardy more than once for the same offense." *State v. Langley*, 156 Conn. 598, 600-601, 244 A.2d 366 (1968), cert. denied, 393 U.S. 1069, 89 S.Ct. 726, 21 L.Ed.2d 712 (1969). The due process and personal liberty guarantees provided by article first, §§ 8 and 9, of the Connecticut constitution, therefore have been held to encompass the protection against double jeopardy. *Kohlfuss v. Warden*, 149 Conn. 692, 695, 183 A.2d 626, cert. denied, 371 U.S. 928, 83 S.Ct. 298, 9 L.Ed.2d 235 (1962).

One of the protections flowing from the double jeopardy guarantee is that against a second prosecution for the same offense after acquittal; *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969); or conviction. *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty." *Green*

*v. United States*, 355 U.S. 184, 187-88, 78 S.Ct. 221, 2 L.Ed.2d 199 (1957).

With reference to these interests, however, "the United States Supreme Court has consistently declined to hold that double jeopardy requires the prosecution 'to join at one *trial* all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction.' (Emphasis added.) *Ashe v. Swenson*, [397 U.S. 436, 453-54, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970)] (Brennan, J., concurring). . . ." (Citation omitted.) *State v. Ellis*, 197 Conn. 436, 474, 497 A.2d 974 (1985).[5] Because not all offenses arising out of a single episode must be tried together, the state insists that the only test to be applied in this case is that set forth in *Blockburger v. United States*, supra. The state argues that application of the *Blockburger* test to this case yields the conclusion that an acquittal of the charge of manslaughter in the second degree with a motor vehicle while intoxicated in violation of General Statutes § 53a-56b does not bar a subsequent prosecution for operating a motor vehicle while under the influence of intoxicating liquor in violation of General Statutes § 14-227a.

In *Blockburger v. United States*, supra, the United States Supreme Court considered whether several offenses charged in a single prosecution were sufficiently

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[5] We are mindful that there is no compulsory joinder statute in this state. The issues of whether a second prosecution is barred by a compulsory joinder law or barred by the double jeopardy clause are separate, independent and distinct issues. See *Illinois v. Vitale*, 447 U.S. 410, 421 n.10, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980).

different to permit the imposition of multiple sentences without violating the double jeopardy clause. It established a test emphasizing a comparison of the elements of the offenses. "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Id., 304. This test is a technical one and examines solely the statutes, charging instruments, and bill of particulars as opposed to the evidence presented at trial, *Iannelli v. United States*, 420 U.S. 770, 785 n.17, 95 S.Ct. 1284, 43 L.Ed.2d 616 (1975) (*Blockburger* test is satisfied if each offense requires proof of a fact that the other does not, notwithstanding substantial overlap in proof offered); see also *State v. McCall*, 187 Conn. 73, 90, 444 A.2d 896 (1982); *State v. Flynn*, 14 Conn.App.10, 18, 539 A.2d 1005 (1988).

In *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the United States Supreme Court extended the *Blockburger* test to apply to successive prosecutions. In that case, the defendant had pleaded guilty to a charge of joyriding, and was later indicted for auto theft, which was defined as "joyriding with the intent permanently to deprive the owner of possession." Id., 167. Applying the *Blockburger* test, the court held that because the offense of joyriding required no proof beyond that necessary to convict the defendant of auto theft, the prosecution for theft was barred by the prior of joyriding conviction. The *Brown* court reiterated that a proper application of the test depended on an analysis of

the statutory elements of the offenses, rather than on the proofs actually offered at trial. Id., 166.

In applying the *Blockburger* test, it is clear that the offenses charged here do not constitute the "same" offense. Although the alleged violations arose out of the same act, each offense requires proof of a fact that the other does not. A conviction of manslaughter in the second degree with a motor vehicle while intoxicated requires proof of (1) operation of a motor vehicle (2) while intoxicated (3) which causes the death of another person. General Statutes § 53a-56b; see footnote 2, supra. A conviction of operating a motor vehicle while under the influence of intoxicating liquor or drugs, requires proof of (1) operation of a motor vehicle (2) on a public highway or on one of the other designated areas (3) while under the influence of intoxicating liquor or drugs. General Statutes § 14-227a; see footnote 1, supra.

While these two offenses share certain elements, each contains an element that the other does not. A conviction for operating a motor vehicle while under the influence of alcohol must be supported by proof that the defendant operated a motor vehicle on one of the locations specified in the statute; such a geographical element is not pertinent to a conviction for manslaughter with a motor vehicle while intoxicated. A conviction for manslaughter with a motor vehicle while intoxicated must be supported by proof that another person died as a result of the defendant's intoxication; such a death element is not pertinent to a conviction for operating a motor vehicle while under the influence of alcohol. For these reasons, the two offenses are not the same under the *Blockburger* test.

The defendant concedes that the two offenses are not the same under a *Blockburger* analysis. He maintains, however, that although he could have been convicted of both offenses charged and received consecutive sentences on both convictions in a single prosecution without violating the double jeopardy clause, the second prosecution is nonetheless barred in this case because the same evidence used in the first prosecution will be the only evidence offered to prove the commission of the offense charged in the second prosecution. In support of his argument, the defendant contends that the United States Supreme Court's application of double jeopardy principles in *Illinois v. Vitale*, supra, modified the application of the traditional *Blockburger* test to all postacquittal[6] or

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[6] The United States Supreme Court has previously recognized that *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932), is not dispositive in successive prosecution cases where principles of collateral estoppel are applicable. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). In that case, the defendant allegedly robbed six poker players in a single incident. He was first prosecuted for robbing four of the gamblers. After acquittal, he was prosecuted for robbing the other two gamblers. The court held that principles of collateral estoppel barred the second trial. *Ashe v. Swenson*, supra, firmly established that the doctrine of collateral estoppel is embedded in the fifth amendment guarantee against double jeopardy. Collateral estoppel may constitute a defense to the second prosecution where the doctrine operates to preclude consideration of those issues which were determined at the first trial, even though the offenses involved are separate and distinct. In order for the doctrine to apply, however, the defendant bears the "burden of proving that the fact-finder [in the first trial acquitted him because it resolved in his

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postconviction prosecutions. We agree and hold that if the same evidence offered to prove a violation of the offense charged in the first prosecution is the sole evidence offered to prove an element of the offense charged in the second prosecution, then prosecution of the second offense is barred on double jeopardy grounds, regardless of whether either offense requires proof of a fact that the other does not.

In *Illinois v. Vitale*, supra, the defendant struck and killed two children while driving an automobile. He was immediately charged with failing to reduce speed to avoid a collision. The defendant pleaded guilty and, after a trial to the court, he was convicted of that offense. The defendant was subsequently charged with involuntary manslaughter premised on the reckless operation of a

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favor the very issue that he seeks to foreclose from consideration in the second trial]." *United States v. Mespoulede*, 597 F.2d 329, 333 (2d Cir. 1979).

Although the defendant in the present case was acquitted of the manslaughter charge involved in the first prosecution, collateral estoppel principles do not apply here to bar the second prosecution for operating a motor vehicle while under the influence, because the acquittal at the first trial did not necessarily resolve the substantive issues of the offense charged at the second trial. The acquittal was based on the trial court's finding that the state failed to prove that the defendant's alleged intoxication caused the death of another person. The trial court did not appear to have resolved the issue of whether the defendant was intoxicated at the time of the fatal accident. As a result, a subsequent inquiry as to whether the defendant was operating a motor vehicle while under the influence of intoxicating liquor is not prohibited on collateral estoppel grounds.

motor vehicle, to which he defended on double jeopardy grounds.

The Supreme Court of Illinois dismissed the manslaughter charge, reasoning that the lesser offense of failing to reduce speed required no proof beyond that which was necessary for conviction of the greater offense and, therefore, the greater offense was, by definition, the same as the lesser offense included within it for purposes of the double jeopardy clause. *In re Vitale*, 71 Ill. 2d 229, 375 N.E.2d 87 (1978). In that decision, however, two justices dissented, arguing that each of the offenses charged required proof of a fact that the other did not. Id., 242. The dissent claimed that the traffic offense of failure to reduce speed need not involve death, whereas involuntary manslaughter need not involve an unlawful failure to reduce speed nor even the use of a motor vehicle.

On certiorari, the United States Supreme Court determined that the record did not contain sufficient information to answer the double jeopardy question under the *Blockburger* test in the context of Illinois law. The court, accordingly, vacated the judgment of the Illinois Supreme Court and remanded the case to that court for further proceedings because the United States Supreme Court was uncertain of the relationship between the two offenses under Illinois law, and did not know which reckless act or acts would be relied upon by the state to prove a violation of the manslaughter charge. *Illinois v. Vitale*, supra, 421.

That court discussed the three possibilities presented. First, the court stated that the double jeopardy clause

would not prohibit a prosecution for involuntary manslaughter provided that a conviction for that offense would not always entail proof of a failure to reduce speed. "The point is that if manslaughter by automobile does not always entail proof of a failure to slow, then the two offenses are not the 'same' under the *Blockburger* test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution." Id., 419. Second, the court clarified that "[i]f, as a matter of Illinois law, a careless failure to slow is always a necessary element of manslaughter by automobile, then the two offenses are the 'same' under *Blockburger* and Vitale's trial on the latter charge would constitute double jeopardy under *Brown v. Ohio*, supra." Id., 419-20. Third, the court in dictum, clouded the apparent applicability of the traditional *Blockburger* test, as previously set forth in the first and second possibilities, stating: "In any event, it may be that to sustain its manslaughter case the State may find it necessary to prove a failure to slow or to rely on conduct necessarily involving such failure; it may concede as much prior to trial. In that case, because Vitale has already been convicted for conduct that is a necessary element of the more serious crime for which he has been charged, his claim of double jeopardy would be substantial under *Brown*[7] and our later decision in *Harris v.*

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[7] In *Brown v. Ohio*, 432 U.S. 161, 169 n.7, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977), the United States Supreme Court recognized that an exception to the double jeopardy bar "may exist where the State is unable to proceed on the more serious

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*Oklahoma*, [433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977)][8] . . . . By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution." *Illinois v. Vitale*, supra, 420-21.

The decision in *Illinois v. Vitale*, supra, has spawned debate as to whether the double jeopardy clause mandates a modification of the traditional *Blockburger* test in successive prosecution cases so as to contemplate an examination of the actual proof at trial. The Connecticut appellate courts have not had an opportunity to decide this issue.[9]

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charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence." This exception is not applicable in the present case.

[8] In *Harris v. Oklahoma*, 433 U.S. 682, 97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977), the United States Supreme Court held that even though the Oklahoma felony murder statute did not on its face require proof of a robbery, a conviction for felony murder based on killing in the course of an armed robbery barred a subsequent prosecution for the robbery offense because the robbery was in fact the underlying felony, all elements of which had been proved in the murder prosecution. The *Brown* court was mindful that the *Blockburger* test "is not the only standard for determining whether successive prosecutions impermissibly involve the same offense." *Brown v. Ohio*, 432 U.S. 161, 166 n.6, 97 S.Ct. 221, 53 L.Ed.2d 187 (1977).

[9] In its appellate brief and at oral argument before this court, the state averred that several "jurisdictions including

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Several courts have concluded that *Vitale* did not alter the traditional *Blockburger* test in successive prosecution cases, and continue to hold that the proper double jeopardy inquiry is whether each offense requires proof of an element not required by the other, without resort to the evidence adduced at trial.[10] See, e.g., *United States v. Genser*, 710 F.2d 1426, 1429-31 (10th Cir. 1983); *United States v. Phillips*, 664 F.2d 971, 1005-1006 (5th Cir. 1981);[11]

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Connecticut, have read *Vitale* as endorsing the *Blockburger* test as the only protection against successive prosecutions. See, e.g., *State v. Truppi*, 182 Conn. 449, 468, 438 A.2d 712 (1980); *State v. McCall*, 187 Conn. 73, 90, 444 A.2d 896 (1982) . . . ." The state has misstated the law on this controlling question. No Connecticut case, including the ones cited by the state, hold that *Blockburger* applies without modification in successive prosecution cases. In fact, each case cited by the state, and all Connecticut appellate court cases that have cited *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980), for the proposition that we do not examine the evidence at trial when applying the *Blockburger* test, involved single trial prosecutions. None of the cases revealed by our research on this issue involved successive prosecutions. All Connecticut cases cited by the state, therefore, are inapposite. There is no dispute that *Vitale* reaffirmed the application of the traditional *Blockburger* test in single prosecution cases.

[10] We note that the Second Circuit Court of Appeals in *United States v. Clark*, 613 F.2d 391, 400 (2d Cir. 1979), afforded no further protection against successive prosecutions than *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). *Clark*, however, was decided prior to the Supreme Court's decision in *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.E.2d 228 (1980).

[11] Since *United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981), the Fifth Circuit Court of Appeals has applied a

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*United States v. Brooklier*, 637 F.2d 620, 623-24 (9th Cir. 1980), cert. denied, 450 U.S. 980, 101 S.Ct. 1514, 67 L.Ed.2d 815 (1981); *State v. Seats*, 131 Ariz. 89, 638 P.2d 1335 (1981) (en banc); *Carlson v. State*, 405 So.2d 173 (Fla. 1981); *People v. Jackson*, 118 Ill.2d 179, 514 N.E.2d 983 (1987), overruling *People v. Zegart*, 83 Ill.2d 440, 415 N.E.2d 341 (1980), cert. denied, 452 U.S. 948, 101 S.Ct. 3094, 69 L.Ed.2d 961 (1981); *People v. Walker*, 109 Ill.2d 484, 488 N.E.2d 529 (1985).

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modified *Blockburger* analysis to claims of double jeopardy in successive prosecution cases, although not advocating or adopting such an interpretation of *Illinois v. Vitale*, 447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980). See, e.g., *United States v. Barrington*, 806 F.2d 529, 534 (5th Cir. 1986) (even when same evidence test applied, there was no double jeopardy violation); accord *Henry v. McFaul*, 791 F.2d 48, 51 (6th Cir. 1986) (no double jeopardy violation even when same evidence test applied); see also *Roberts v. Thigpen*, 693 F.2d 132 (N.D.Miss. 1982), discussed at footnote 12, infra, cf. *United States v. Gibson*, 820 F.2d 692, 698-99 (5th Cir. 1987) (although a mechanical application of the *Blockburger* rule dictated conclusion of distinct and separate offenses, application of the principle that " '[l]enity is a tool of statutory construction' " yielded conclusion that the defendant could be convicted of only one of the two offenses charged); *Davis v. Herring*, 800 F.2d 513, 518 (5th Cir. 1986) (although not deciding whether *Vitale* mandates inquiry into actual evidence adduced at trial, court held that *Blockburger* test is not the only standard for determining whether successive prosecutions will be barred and that successive prosecutions will be barred where the second prosecution requires the relitigation of factual issues already resolved by the first prosecution); accord *United States v. Patterson*, 782 F.2d 68, 73-75 (7th Cir. 1986) (doctrine of collateral estoppel applied), citing *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

These courts appear to apply an unmodified *Blockburger* analysis to successive prosecution cases for basically three reasons. The first reason is the statement in *Vitale* that *Blockburger* is "the principal test for determining whether two offenses are the same for the purposes of barring successive prosecutions." *Illinois v. Vitale*, supra, 416; see, e.g., *United States v. Brooklier*, supra, 624. The second reason is the following statement made by Justice Rehnquist, regarding the import of the dicta in *Vitale*, in a dissenting opinion to a case in which the United States Supreme Court declined to clarify *Vitale*: "But I am reasonably sure that the Court did not intend to transmute the traditional double jeopardy analysis from an either 'up or down' inquiry based on the evidence required to prove the statutory elements of a crime into a 'substantial claim' inquiry based on the evidence the State introduced at trial." *Thigpen v. Roberts*, 468 U.S. 27, 36, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984) (Rehnquist, J., dissenting).[12] The third reason is the fact that three

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[12] In *Thigpen v. Roberts*, 468 U.S. 27, 104 S.Ct. 2916, 82 L.Ed.2d 23 (1984), the defendant was initially charged with reckless driving, driving while his license was revoked, driving on the wrong side of the road, and driving while intoxicated, all offenses arising from a fatal automobile accident. After the defendant was convicted of these four misdemeanors and while his appeal was pending, the defendant was indicted for manslaughter based on the same accident, and was convicted. The defendant brought a habeas corpus action in the federal District Court, which held that the manslaughter prosecution violated the double jeopardy clause and that substitution of a felony charge covering the same conduct for which the defendant had been convicted of the misdemeanor violated the due process clause of the fourteenth amendment.

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justices of the United States Supreme Court dissented to the denial of certiorari in a case where the Supreme Court

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The Fifth Circuit Court of Appeals affirmed, relying solely on the double jeopardy argument. *Roberts v. Thigpen*, 693 F.2d 132 (5th Cir. 1982). The United States Supreme Court affirmed on the due process ground, without deciding the double jeopardy issue. In dissent, Justice Rehnquist stated: "I believe that the Court is obligated to confront the State's contention that the Court of Appeals misapplied the Double Jeopardy Clause of the Fifth Amendment in this case. The Court being unwilling to undertake that obligation, I turn to it in dissent. . . .

"In reaching this conclusion, I believe that the Court of Appeals mistakenly relied upon a mere form of expression in the Court's opinion in *Illinois v. Vitale*, [447 U.S. 410, 100 S.Ct. 2260, 65 L.Ed.2d 228 (1980)], to depart from all of our previous double jeopardy holdings in this area. The Court of Appeals apparently felt that the *Vitale* opinion changed governing double jeopardy law to permit a defendant to establish a substantial, and apparently dispositive, claim of double jeopardy merely by showing that the State actually relied upon the same evidence to prove both crimes. While there is one sentence in the Court's opinion in *Vitale* that supports this construction, I do not believe that construction is consistent with the opinion as a whole. Until the present case, the relevant question to be answered by any court is whether the evidence required to prove the statutory elements of crime is the same, not whether the evidence actually used at trial is the same.

"In *Vitale* the Supreme Court of Illinois had held that the Double Jeopardy Clause of the Fifth Amendment barred the prosecution of a defendant for manslaughter because the defendant had previously pleaded guilty to a charge of failing to reduce speed arising out of the same incident. This Court vacated the judgment of the Supreme Court of Illinois, saying: "The point is that if manslaughter by automobile does not

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of Illinois held that the double jeopardy clause had been violated because the state intended to use the same factual basis which supported the first conviction as the

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always entail proof of a failure to slow, then the two offenses are not the "same" under the *Blockburger* test. The mere possibility that the State will seek to rely on all of the ingredients necessarily included in the traffic offense to establish an element of its manslaughter case would not be sufficient to bar the latter prosecution.' . . .

"It seems to me that this is about as clear a statement as there can be of the principle that the double jeopardy inquiry turns on the statutory elements of the two offenses in question, and not on the actual evidence that may be used by the State to convict in a particular case. Nonetheless, the Court went on in *Vitale* to distinguish *Harris v. Oklahoma*, 433 U.S. 682 [97 S.Ct. 2912, 53 L.Ed.2d 1054 (1977)], and in so doing stated: 'By analogy, if in the pending manslaughter prosecution Illinois relies on and proves a failure to slow to avoid an accident as the reckless act necessary to prove manslaughter, Vitale would have a substantial claim of double jeopardy under the Fifth and Fourteenth Amendments of the United States Constitution.' . . .

"I cannot say that this last expression did not afford the Court of Appeals some ground for the views which it expressed, nor can I say that I think it is entirely consistent with the first quotation from the *Vitale* opinion. But I am reasonably sure that the Court did not intend to transmute the traditional double jeopardy analysis from an either 'up or down' inquiry based on the evidence required to prove the statutory elements of a crime into a 'substantial claim' inquiry based on the evidence that the State introduced at trial. I think that there are ambiguities in *Illinois v. Vitale* which urgently need resolution by this Court, that the present case affords an ample opportunity to do this, and that the Court's failure to do it is an unexampled abdication of its responsibility.

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basis for the second conviction. *People v. Zegart*, supra, 445. The dissent emphasized that courts were required to look to the statutory elements of the first and second charges, not to the similarities of facts in the prosecution's proof. *Illinois v. Zegart*, 452 U.S. 948, 951, 101 S.Ct. 3094, 69 L.Ed.2d 961 (1981). (Burger, C. J., dissenting from denial of certiorari); see, e.g., *People v. Jackson*, supra.

We find these reasons unpersuasive. First, although *Blockburger* is the "principal test" employed in analyzing any double jeopardy claim, it is not the only test. *Harris v. Oklahoma*, supra; *Ashe v. Swenson*, supra; *In re Nielson*, 131 U.S. 176, 95 S.Ct. 672, 33 L.Ed. 118 (1889). Second, the significance of Justice Rehnquist's dissent in *Thigpen v. Roberts*, supra, as reflecting what a majority of the United States Supreme Court interprets *Vitale* as holding, is debatable. Third, the impact of the fact that three justices dissented to the denial of certiorari in *Zegart* is ameliorated by the impact of the denial itself. Although denials of certiorari by the United States Supreme Court have no

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"I would unambiguously reaffirm the statement in *Brown v. Ohio*, 432 U.S. 161 [97 S.Ct. 2221, 53 L.Ed.2d 187 (1977)], relied upon in *Illinois v. Vitale*, supra, that ' "[t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." ' 432 U.S., at 166, quoting *Blockburger v. United States*, 284 U.S. 299, 304 [52 S.Ct. 180, 76 L.Ed. 306 (1932)]. . . . The actual evidence test which the Court of Appeals inferred from the single sentence in *Vitale* has never been applied to bar a second trial on grounds of double jeopardy." (Citations omitted.) *Thigpen v. Roberts*, supra, 34-39 (Rehnquist, J., dissenting).

precedential authority, the denial in *Zegart* certainly does not refute the argument that a majority of the court considers the *Blockburger* test as modified by inquiry into the repetition of proof to be the proper double jeopardy approach in successive prosecution cases. See, e.g., *People v. Gartner*, 143 Ill. App. 3d 113, 491 N.E.2d 927 (1986), overruled by *People v. Jackson*, supra.

We, therefore, decline to follow the holdings set forth in the above cases, and adopt instead the rationale advanced by those courts that have interpreted *Vitale* to mean that in successive prosecution cases, two offenses might be considered the "same offense" for double jeopardy purposes, despite dissimilar statutory elements, where the same evidence or conduct proves both offenses. See, e.g., *Lee v. Probate Court*, 807 F.2d 512, 514 (6th Cir. 1986); *Flittie v. Sadem*, 775 F.2d 933, 938-39 (8th Cir. 1985); *Jordan v. Virginia*, 653 F.2d 870, 873 (4th Cir. 1980); *Pandelli v. United States*, 635 F.2d 533, 539 (6th Cir. 1980); *Jeffrey v. District Court*, 626 P.2d 631, 636 (Colo. 1981) (en banc); *Baker v. State*, 425 So. 2d 36, 40 (Fla. App. 1983) (Sharp, J., concurring); *State v. Ferrell* 67 Md. App. 631, 508 A.2d 1023 (1986); *State v. Gardner*, 315 N.C. 444, 340 S.E.2d 701 (1986); *State v. DeLucca*, 108 N.J. 98, 527 A.2d 1355 (1987); *State v. Dively*, 92 N.J. 573, 458 A.2d 502 (1983); *State v. Carter*, 291 S.C. 385, 353 S.E.2d 875 (1987); *State v. Grampus*, 288 S.C. 395, 343 S.E.2d 26 (1986); *Ex parte Peterson*, 738 S.W.2d 688 (Tex. Crim. App. 1987); *May v. State*, 726 S.W.2d 573 (Tex. Crim. App. 1987) (en banc); c.f. *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442 (1982); *Haynes v. State*, 249 Ga. 119, 288 S.E.2d 185 (1982) (under state statute, where actual evidence used to establish one crime also establishes a different crime, the two crimes

merge and a defendant can be convicted of only one of the crimes).

We are persuaded that the more accurate reading of *Illinois v. Vitale* is that it enhanced the protection afforded a defendant facing a second prosecution on proof of the same facts. Although *Vitale* does not suggest that it is necessarily a constitutional violation to offer the same evidence at a second prosecution, it is clear that the court was concerned that the same evidence would be offered at retrial solely to prove conduct that was a necessary element of the offense of which the defendant had already been convicted. The court, therefore, viewed the issue as whether, in retrospect, the state had merely proven a lesser or greater included offense. See *Illinois v. Vitale*, supra, 420-21, citing *Harris v. Oklahoma*, supra; *Brown v. Ohio*, supra.

The reasons for applying a modified *Blockburger* standard in this case are compelling. Successive prosecution cases involve the core values protected by the double jeopardy clause. Successive prosecutions implicate a component of double jeopardy protection not implicated in single prosecutions of joined charges such as those involved in *Blockburger*. It protects not only against multiple punishments but also against multiple trials for the same offense. See *United States v. Wilson*, 420 U.S. 332, 343-44, 95 S.Ct. 1013, 43 L.Ed.2d 232 (1975); *Green v. United States*, supra, 187-88; *United States v. Oppenheimer*, 242 U.S. 85, 37 S.Ct. 68, 61 L.Ed. 161 (1916). When the issue is purely one of multiple punishments, the right to be free from vexatious proceedings simply is not present. The interest of the defendant in single trial prosecutions is in not having more punishment imposed than that

intended by the legislature. When the issue is one of multiple trials, the double jeopardy clause vindicates principles of finality and repose of former judgments and of fundamental fairness that simply are not involved in a single prosecution of joined charges. Basically, it insures that having once "run the gauntlet" of a criminal trial to either a judgment of conviction or acquittal, a person ought not to be required a run essentially the same gauntlet again.

This rationale leads to our conclusion that the test for determining whether the "same offense" is involved in successive prosecution cases should be one more protective of criminal defendants than is the relatively strict analytical *Blockburger* test that is decisive in single prosecution cases. We therefore adopt the actual evidence test in successive prosecution cases because it is a standard with more practical flexibility than the *Blockburger* same evidence test, as it directs a pragmatic inquiry into whether the evidence actually used to establish a conviction in the first prosecution is identical to that which will be used to establish a conviction in the second prosecution.

Applying the modified *Blockburger* actual evidence test to this case, we hold that the prosecution of the defendant for operating while under the influence is barred as violative of the double jeopardy clause. Given the record before us, it is clear that the state intends to relitigate the issue of whether the defendant was operating while under the influence of intoxicating liquor. The record clearly shows that the state will rely on and seek to prove in the second prosecution for operating under the influence the same act of operating while intoxicated

on a public roadway necessary to prove the manslaughter charge in the first prosecution. Because the defendant has already been acquitted of conduct that is here shown to be a necessary element of the less serious crime for which he has been charged, his claim of double jeopardy is substantial under *Vitale*. In this case, furthermore, the defendant's substantial claim is also a successful one.[13]

Although the state may elect to sever for trial charges arising out of the same transaction or occurrence, it must do so in full cognizance of the enhanced double jeopardy protection afforded to the defendant as a result of forcing him to withstand more than one criminal prosecution.

There is no error.

In this opinion the other judges concurred.

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[13] The state argued that even if the trial court interpreted *Vitale* as modifying the application of *Blockburger* in successive prosecution cases, because the defendant failed to object to the state's request to sever the charges, the defendant waived his double jeopardy rights. This argument was not made in this court but requires little discussion. First, the state cites no authority for such a proposition. Second, the state did not make any attempt to show that the mere failure to object to a severance of the charges for trial constitutes an implied waiver of the personal right to be immune from double jeopardy. This case is not similar to a situation where a defendant has impliedly waived the guarantee against double jeopardy by proceeding to trial, verdict and judgment without raising a double jeopardy claim. See *State v. Price*, 208 Conn. 387, 390, ___ A.2d ___ (1988). Furthermore, this case does not present a situation where a defendant specifically requested the severance of charges. Accordingly, we conclude that the defendant in this case did not waive his constitutional right to be free from being placed in double jeopardy.

STATE OF CONNECTICUT

SUPREME COURT

NO. 13640

STATE OF CONNECTICUT

V.

JOHN LONERGAN

: DECEMBER 14, 1989

*ORDER*

THE MOTION OF THE STATE OF CONNECTICUT, FILED DECEMBER 5, 1989, FOR REARGUMENT AND/OR RECONSIDERATION, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

/s/ Francis J. Drumm, Jr.
CHIEF CLERK

NOTICE SENT: 12-15-89
GEOFFREY MARION, D.A.S.A.
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CLERK, HARTFORD AT GA 14
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HON. MICHAEL MACK
REPORTER OF JUDICIAL DECISIONS